No. 466

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1932.

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of WILLIAM H. PORTER, Deceased,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WALTER E. HOPE,
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15 Broad Street,
New York, N. Y.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, respectfully show:

Statement.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision made and entered in said court on July 26, 1932, affirming (except as to a minor point) a determination of the United States Board of Tax Appeals in a proceeding wherein your petitioners were the

petitioners and the Commissioner of Internal Revenue was the respondent (Tr., fol. 12).

The purpose of said proceeding was to determine the petitioners' liability, to wit, the liability of the estate of the petitioners' testator, William H. Porter, under the Revenue Act of 1926 (44 Stat. 9) to Federal Estate Tax. It presented this question:

> In the valuation and assessment under the 1926 Revenue Act of a resident decedent's estate for Estate Tax purposes, should property be included in the gross estate for purposes of taxation under section 302 (d) which, several years previously and not in contemplation of death, the decedent had transferred to a trustee absolutely and completely, except for a power reserved for life to modify or alter the trust instrument in any manner provided that "this power to modify or alter is not in- "tended, and shall not be construed to include the "right of the Donor to make such modification or "alteration in his own favor or in favor of his "estate, but shall apply only so far as the inter- "ests of third persons may be concerned."

The Board of Tax Appeals answered this question affirmatively. The Circuit Court of Appeals affirmed the determination of the Board of Tax Appeals.

Reasons for Review.

I.

The decision in this case is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham*, 45 Fed. (2nd Ser.) 454. Moreover the Court of Appeals of the District of Columbia in *Cover* v. *Burnet* (53 Fed. (2nd) 915) concurs on this question with *Brady* v. *Ham*. Accordingly direct conflict exists between the First Circuit and the Second Cir-

cuit on the one hand, and between the District of Columbia and the Second Circuit on the other.

II.

The case involves a question of Congressional power under the Constitution which is perhaps of recent development. In this case, in the opinion, the Circuit Court of Appeals holds that "*Congress may measure an excise as it will*". The Supreme Court has squarely held that an attempt by Congress to tax a transfer at death by the measure of the value of the estate plus the value of property given away by the decedent absolutely within two years of death is void (*Heiner* v. *Donnan,* 285 U. S. 312). There is therefore *some* restraint on the power of Congress to measure an excise "as it will".

III.

The decision in this case appears to be in conflict with the decision of the Supreme Court in *Reinecke* v. *Northern Trust Co.* (278 U. S. 339), thereby creating a confusion detrimental to precise or consistent application of this law of daily application. The act which was under consideration in *Reinecke* v. *Northern Trust Co.* provided that property conveyed away during life but subject to take effect in possession or enjoyment at or after death should be brought into the tax-measure (Cf. Revenue Act of 1926, sec. 302-d). In the *Reinecke* case the court held that the act did not extend to interests vested when created although possession and enjoyment of the transferred interest commenced at or after death, and stated as the reason, that no interests were intended to be reached other "than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death". In the present case the act provides that property transferred during life

subject to any change through the exercise of a power to alter, amend, or revoke should be brought into the tax-measure (sec. 302-d), and in view of the *Reinecke* case one infers that here too no interests were intended to be reached other "than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death".

It is respectfully submitted that this apparent inconsistency between the logic of the *Reinecke* case (and Cf. *May* v. *Heiner*, 281 U. S. 238) and that of the Circuit Court of Appeals in the present case, is confusing, and that a clearing up of that confusion would be of general benefit.

It is also respectfully submitted that in the respects set forth in the accompanying brief the decision in this case by the Circuit Court of Appeals appears also to be in conflict with the decision of this court in *Nichols* v. *Coolidge*, 274 U. S. 531.

WHEREFORE, your petitioners, referring to the accompanying brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, to certify and send to this court a full and complete transcript of the record herein, to the end that the said case may be reviewed and determined by this court as provided by law, and that the decision of said Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just.

And your petitioners will ever pray.

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of WILLIAM H. PORTER, Deceased.

By WALTER E. HOPE,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

WALTER E. HOPE, being duly sworn, says:

I am attorney for the petitioners in the matter of the foregoing application for a writ of certiorari. I have read said petition and know its contents, and the facts therein stated are true to the best of my knowledge, information, and belief.

WALTER E. HOPE.

Sworn to before me this
October 19, 1932.

PEARL E. LOEBER
Notary Public, Kings County
Kings Co. Clk's No. 641, Reg. No. 3342
N. Y. Co. Clk's No. 805, Reg. No. 3-L-516
Commission Expires March 30, 1933.

[SEAL]

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In the

Supreme Court of the United States,

OCTOBER TERM—1932.

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased,
Petitioners,
against
Commissioner of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Statement.

The petitioners are the executors of the Estate of William H. Porter, who died a citizen and resident of the United States and of New York. The respondent is the Commissioner of Internal Revenue.

This cause originated in an application of the petitioners to the United States Board of Tax Appeals to review the determination of said Commissioner respecting the Estate Tax liability of your petitioners as executors (Tr., fols. 11, 12). It was duly heard in Washington by said Board of Tax Appeals, before which Board the case was made as stated below and in the transcript of the record filed herewith (Tr., fols. 220-317). The decision of the Board was adverse to your petitioners

and your petitioners thereupon petitioned the United States Circuit Court of Appeals, Second Circuit, to review the decision of the Board of Tax Appeals (Tr., fols. 253-282; 325-368). The case duly came on to be heard before the Circuit Court of Appeals, which court on July 25, 1932, affirmed the determination of the Board of Tax Appeals in respect of said matter. The mandate on the affirmance was entered July 26, 1932.

II.

Facts.

The estate concerned is that of William H. Porter, who died November 30, 1926, resident in New York (fol. 225). The petitioners are his executors (fol. 227).

On October 18, 1918, the decedent transferred $100,000. in securities in trust to Bankers Trust Company for his daughter and her son (Petition, Exhibit B, fol. 67). This is designated "Trust No. 1" in the findings (fols. 227, 228). On the same day he transferred a like amount to the same trustee for his son and the son's daughter (Respondent's Exhibit A, fol. 466). This is designated "Jamie Porter Trust No. 1" in the findings (fol. 244). On February 1, 1919, he created a third trust with the same trustee comprising $100,000. in securities for his daughter and her son mentioned above (Petition, Exhibit C, fol. 102). This is designated "Trust No. 2" in the findings (fol. 229). On June 27, 1919, he created with the same trustee a fourth trust of like value, for his son's daughter (Respondent's Exhibit B, fol. 502). This is designated "Jamie Porter Trust No. 2" in the findings (fol. 245). The petition, with its exhibits, is in evidence (fols. 388, 389).

The findings set forth the substance of the beneficial provisions of the several instruments creating these trusts (fols. 228-231; fols. 240-242; fols. 244-246). All

four of them dispose of all interests in the property affected, and they are in their provisions ordinary trust conveyances. Each contains the following provision (fols. 231-234):

> "TENTH: Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successors said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born, or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

After these four trusts were created, the decedent's daughter had two more children (fol. 235). The decedent decided that he wished to include them with their elder brother in the benefits of Trusts Nos. 1 and 2 (fols. 235,

236). He undertook to do this by attempting to revoke Trusts Nos. 1 and 2, as if the reserved power enabled him to revoke. He delivered to the trustee two instruments, one for each trust (Nos. 1 and 2) as follows (fols. 236-240):

> "Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.
>
> Very truly yours,
> (Signed) Wm. H. Porter. (Seal)
>
> State of New York)
> County of New York) ss.:
>
> On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.
>
> (Signed) James J. McDermott."

At the same time or immediately thereafter on the same day the decedent delivered a new trust deed to the same trustee purporting to grant all of the same property comprised by Trusts Nos. 1 and 2, and nothing else, upon trusts for his daughter and all of her children (fols. 240-242). This new instrument, called "Trust No. 3" in

the findings (fol. 242), was similar to its predecessors and contained *verbatim* the same reservation of power quoted above (fols. 240-242). Although there is no finding on the subject, the proof is that the trustee did not redeliver any part of the trust corpus to the decedent, but retained possession throughout (fols. 413-416) and would have refused to part with it if requested (fol. 414).

The decedent died November 30, 1926 (fol. 225).

None of these transfers was made in contemplation of death. This is expressly found as to the 1926 transaction (fol. 243) and as to Trusts Nos. 1 and 2 (fol. 234). There is no finding either way as to the Jamie Porter Trusts Nos. 1 and 2, but both were made more than seven years before death, and no attempt was ever made to alter or amend either of them.

ARGUMENT.

FIRST POINT.

There is a direct conflict between Circuits.

The facts in this case, stated above, and those presented in *Brady* v. *Ham*, decided by the Circuit Court of Appeals for the First Circuit and reported in 45 Fed. (2nd Ser.), 454, 455, are in every material respect identical and the controlling statutory provisions concerned are identical (Rev. Act of 1924, sec. 302-d and Rev. Act of 1926, sec. 302-d). The decisions are directly opposite. The provision of the declaration of trust which gave rise to the controversy in *Brady* v. *Ham*, *supra*, is stated by the court at page 455 as follows:

> " 'Said Elizabeth S. Haynes shall have full power to make any additions to the trust property and to change and alter any or all of the trusts herein set forth, to name any beneficiaries other than those above named *except herself*, whether by

way of addition of substitution, and to appoint another trustee or other trustees at any time either by way or addition or substitution for the trustee or trustees at any time acting.' "

Cover v. *Burnet*, 53 Fed. (2nd) 915, a case decided by the Court of Appeals of the District of Columbia is likewise in direct conflict with the decision of the Circuit Court of Appeals in this case since it involved substantially the same facts and the identical statutory provisions involved in the present case. The decision in *Cover* v. *Burnet* is in accord with that in *Brady* v. *Ham*.

SECOND POINT.

The decision in the present case is believed to be in conflict with applicable decisions of the Supreme Court.

Reference is had to *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 and *May* v. *Heiner*, 281 U. S. 238, which follows *Reinecke* v. *Northern Trust Co.*, and to *Nichols* v. *Coolidge*, 274 U. S. 531.

Reinecke v. *Northern Trust Co.*, and *May* v. *Heiner*, arose under the 1921 Revenue Act, sec. 402 (c), a provision carried over into the 1924 and 1926 acts as 302 (c), where it is coördinate with, and in structure and general intent similar to, sec. 302 (d) of the 1926 act. Sections 302 (c) and 302 (d) parallel and complement each other. Each describes property transferred previously to death which is to be included in the gross estate at death for purposes of taxation. Section 302 (c) brings in property "to the extent of" interests previously transferred "intended to take effect in possession or enjoyment at or after his death". Section 302 (d) brings in property "to the extent of" interests previously transferred "where the enjoyment thereof was subject at the date "of his death to any change through the exercise of a

"power * * * to alter amend or revoke". In *Reinecke* v. *Northern Trust Co.* the Supreme Court said of sec. 302 (c):

> "* * *. In the light of the general purpose of the statute and the language of sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under sec. 401. That doubt must be resolved in favor of the taxpayer * * *."

In the present case the Circuit Court of Appeals declined to follow this reasoning with respect to sec. 302 (d).

In *Brady* v. *Ham* the Circuit Court of Appeals, First Circuit, followed what it believed to be the *principle* laid down in the decisions of the Supreme Court, namely, that as the tax is on the transfer at death of estates, the tax is measured only by property in which the decedent retained an economic interest till death (Cf. *Chase National Bank* v. *United States*, 278 U. S. 327). If the court was right, in *Brady* v. *Ham*, in the belief that the case was in effect ruled by decisions in this court including *Reinecke* v. *Northern Trust Co.* and *Chase National Bank* v. *United States*, the decision in this case is in conflict with decisions of this court.

That the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham* believed it was governed by decisions of this court as set forth above is made plain by the following quotation from the opinion:

> "*The decedent, Elizabeth S. Haynes, by her declaration of trust expressly deprived herself of the enjoyment of all economic benefits in the trust estate. While she might control the final disposition of it so far as the beneficiaries were concerned,*

> *she could not restore to herself any beneficial enjoyment of it.* She reserved no power of revocation as in the first 'two trusts' in the Reinecke case [citing cases]. So far as any economic benefits of the trust estate were concerned, they passed to the trustee at the time of the execution of the declaration of trust. The enjoyment of them may not have been definitely settled on the beneficiaries until her death and the beneficiaries may have been subject to a succession tax, but the right of enjoyment of any economic benefits thereof irrevocably passed from the decedent in 1911. To hold that such property was subject to a transfer tax would amount to what the Supreme Court had termed in the above-cited cases as an arbitrary and capricious exercise of legislative power."

In regard to *Nichols* v. *Coolidge, supra,* the transfer of the property sought by the Commissioner to be brought into the computation of the gross estate took effect before the legislation under which the Commissioner claimed to act. The applicable act (Rev. Act of 1919, sec. 402-c) brought into the gross estate transfers *inter vivos* intended to take effect in possession or enjoyment at or after death. The Supreme Court held that this provision, as applied to the value of property transferred before its enactment, was unconstitutional, and said at pages 542 and 543 of the 274th U. S.:

> "* * *. And we must conclude that sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by the decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequently to the enactment, we need not now consider."

In the present case the transfers were made previously to any enactment including in the gross estate, for

Estate Tax purposes, property previously transferred subject to a change of enjoyment through the exercise of a retained power, and it is submitted that, under *Nichols* v. *Coolidge,* it should be held that the inclusion "is unconstitutional in so far as it requires that there "shall be included in the gross estate the value of prop-"erty transferred by the decedent prior to its passage "merely because the conveyance was" at the death subject to a wholly non-beneficial power to change the enjoyment.

* * * * * * *

It is submitted that the true construction and application of a taxing statute in everyday use is involved, that a clear conflict of decisions of Circuit Courts of Appeal in different circuits exists concerning that application, that the decision below is in conflict with applicable decisions of the Supreme Court that the question of Federal law presented is important, and that the decision of the Circuit Court of Appeals in this case should be reviewed by writ of certiorari and reversed.

Respectfully submitted,

WALTER E. HOPE,
Counsel for the Petitioners,
15 Broad Street,
New York, N. Y.

APPENDIX.

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) * * * *

(b) * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust

or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

(e) • • • •